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6 **UNITED STATES DISTRICT COURT**  
7 **DISTRICT OF NEVADA**

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10 JAMES KELLY,  
11 Plaintiff,

2:08-cv-00088-KJD-RJJ

12 v.

**ORDER**

13 CSE SAFEGUARD INSURANCE  
14 COMPANY,  
15 Defendant.

Plaintiff's Motion for Attorney Fees and  
Costs Incurred in Opposing Defendant's  
Motion to Disqualify and in Filing Plaintiff's  
Motion to Compel (#105)

16 This matter was submitted to the undersigned Magistrate Judge on Plaintiff's Motion for  
17 Attorney Fees and Costs Incurred in Opposing Defendant's Motion to Disqualify and in Filing  
18 Plaintiff's Motion to Compel (#105). The Court also considered Defendant's Opposition (#107),  
19 Plaintiff's Reply (#109), and the argument and representations of counsel at a hearing held on  
20 this matter..

21 **BACKGROUND**

22 **1. Facts**

23 This is an insurance bad faith (refusal to settle) case that stems from an automobile  
24 collision. Kelly was injured in a collision as a result of negligence by Jose Cruz and Andre  
25 Torres Flores. Cruz and Flores were insured by CSE Safeguard Insurance Company (CSE). A  
26 week after the accident, Kelly sent a demand letter to CSE requesting that CSE tender the policy  
27 limits because Cruz and Flores' liability allegedly exceeded the policy limit. CSE did not  
28 comply for various reasons, including the fact that the letter was sent to the wrong address. CSE

1 and Kelly then participated in settlement negotiations and CSE conducted its investigation.  
2 CSE's investigation was fraught with delays.

3 During this time, Kelly negotiated stipulated judgments with Flores and Cruz for \$1.5  
4 million each. Kelly, Cruz, and Flores then filed the instant complaint alleging bad faith on the  
5 part of CSE.

## 6 **2. Procedural History**

### 7 a. Kelly's Motion to Disqualify CSE's Counsel (#46)

8 Kelly filed a Motion to Disqualify CSE's Counsel (#46). That motion was denied by  
9 Order (#65). In that Order (#65), the Court pointed out in its conclusion that it was "hard pressed  
10 to find a more egregious example of abusive process" and that "[s]anctions may be appropriate  
11 under 28 U.S.C. § 1927, FED. R. CIV. P. 11, or the Court's inherent authority." Order #65 at 4 ll.  
12 12-13; 16-17.

13 Subsequently, CSE filed a Motion for Fees (#71) pursuant to 28 U.S.C. § 1927 based on  
14 the Court's Order (#65). That motion was granted. Minute Order (#104).

### 15 b. CSE's Motion to Disqualify Kelly's Counsel (#86)

16 CSE filed a Motion to Disqualify Kelly's Counsel (#86). That motion was denied  
17 because CSE failed to show that Kelly's counsel would be a necessary witness at trial. Order  
18 (#100).

### 19 c. Kelly's Motion to Compel (#82)

20 Kelly filed a Motion to Compel (#82). CSE never filed a response. Discovery was  
21 eventually stayed by Order (#97) pending CSE's Motion to Disqualify (#86). The Court granted  
22 Plaintiff's Motion to Compel (#82) during a hearing, and instructed CSE to respond. Minute  
23 Order (#104). CSE responded.

24 After the Court denied the Motion to Disqualify (#86), and granted the Motion to Compel  
25 (#82), Plaintiff filed a Motion for Attorney Fees and Costs Incurred in Opposing Defendant's  
26 Motion to Disqualify and in Filing Plaintiff's Motion to Compel (#105). CSE claims that this  
27 motion is retaliatory.

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## DISCUSSION

### **1. 28 U.S.C. § 1927 Sanctions**

28 U.S.C. § 1927 states:

Any attorney or other person admitted to conduct cases in any court of the United States or any Territory thereof who so multiplies the proceedings in any case unreasonably and vexatiously may be required by the court to satisfy personally the excess costs, expenses, and attorneys' fees reasonably incurred because of such conduct.

The key term in the statute is “vexatiously.” *In re Girardi*, 611 F.3d 1027, 1060 (9th Cir. 2010)<sup>1</sup>. Carelessly, negligently, or unreasonably multiplying the proceedings is not enough. *Id.* Section 1927 sanctions are warranted when a party either: (1) recklessly or intentionally misleads the court, or (2) the court finds that the attorney recklessly raised a frivolous argument. *In re Girardi*, 611 F.3d at 1061. Therefore, Section 1927 sanctions are justified if an argument is reckless and frivolous. *Id.* The view that a reckless, not-entirely-frivolous filing can be sanctioned is erroneous. *In re Keegan Management Co., Securities Litigation*, 78 F.3d 431, 436 (9th Cir. 1996).

Here, CSE's motion to disqualify was not reckless and frivolous, nor CSE intentionally or recklessly mislead the Court. Though the court ultimately disagreed with CSE, its motion to disqualify contains non-frivolous argument.

Because Kelly's Motion to Disqualify CSE's Counsel (#46) was entirely reckless and frivolous, Section 1927 sanctions were justified. *See* Order (#65) at 4 ll. 13-17. CSE's Motion to Disqualify Kelly's Counsel (#86) is not entirely frivolous. Therefore, Section 1927 sanctions are not justified.

### **B. Whether Kelly is Entitled to Section 1927 Fees and Costs for Filing His Motion to Compel (#82)**

Kelly requested sanctions under Section 1927, for having to file a Motion to Compel Answers to Interrogatories (#82). Kelly's motion for sanctions fails to cite the legal standard for

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<sup>1</sup>This case was amended September 10, 2010. The amendment is factual only, and has no bearing on any holding in the case. *See In re Girardi*, — F.3d — ; 2010 WL 3517899 (9th Cir. 2010).

1 Section 1927 sanctions or any other type of sanction. In order to be awarded fees and costs  
 2 pursuant to Section 1927, Kelly must show that CSE's failure to answer interrogatories  
 3 "multiplie[d] the proceedings in [this] case unreasonably and vexatiously." 42 U.S.C. § 1927.  
 4 A party's conduct is sufficient to impose sanctions under Section 1927 by (1) recklessly or  
 5 intentionally misleading the court, or by (2) a finding that the attorney recklessly raised a  
 6 frivolous argument. *In re Girardi*, 611 F.3d at 1061. Kelly failed to explain why or how CSE's  
 7 answers to interrogatories recklessly misled the court or why or how CSE's answers to  
 8 interrogatories were reckless and frivolous.

9 Section 1927 is not the correct provision for the nature of complaint Kelly has about  
 10 CSE's answers to interrogatories. Kelly's request for sanctions for bringing his Motion to  
 11 Compel (#82) should have been brought pursuant to FED R. CIV. P. 37(a)(5)(A) which states:

12 If the motion is granted--or if the disclosure or requested discovery is provided  
 13 after the motion was filed--the court must, after giving an opportunity to be heard,  
 14 require the party or deponent whose conduct necessitated the motion, the party or  
 15 attorney advising that conduct, or both to pay the movant's reasonable expenses  
 16 incurred in making the motion, including attorney's fees. But the court must not  
 17 order this payment if:

18 (i) the movant filed the motion before attempting in good faith to obtain the  
 19 disclosure or discovery without court action;

20 (ii) the opposing party's nondisclosure, response, or objection was substantially  
 21 justified; or

22 (iii) other circumstances make an award of expenses unjust.

23 Kelly failed to cite to or ask for sanctions under the appropriate law. Therefore, no sanctions will  
 24 be awarded.

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**CONCLUSION**

Based on the foregoing, and good cause appearing therefore,  
IT IS HEREBY ORDERED that Plaintiff's Motion for Attorney Fees and Costs Incurred  
in Opposing Defendant's Motion to Disqualify and in Filing Plaintiff's Motion to Compel (#105)  
is **DENIED**.

DATED this 21<sup>st</sup> day of July, 2011.

  
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ROBERT J. JOHNSTON  
United States Magistrate Judge